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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

TEMORA TRADING CO., INC.,

Petitioner,

vs.

WALLACE PERRY, as Trustee of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, Bankrupts,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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QUESTIONS PRESENTED

1. Whether a Bahamian Corporation has been denied due process of law when its real property was confiscated by a Nevada court which struck its answer and entered a default judgment against it, in an in rem action, because its officers refused to attend depositions in the Bahamas unless they were conducted under the requirements of Bahamian Law?

2. Whether a Bahamian Corporation was denied due process of law by the action of the Nevada court, in ordering depositions of its officers in the Bahamas, without complying with Bahamian Law, and then striking the Answer of the Bahamian Corporation when it insisted that the Plaintiff follow the requirements of Bahamian Law in conducting the depositions?

PARTIES TO THE PROCEEDINGS BELOW

The parties to Nevada State Court in rem action are Plaintiff-Appellee Wallace Perry as Trustee in Bankruptcy of the Bankrupt Estate of Boyd James O'Donnell and Joan O'Donnell, and Defendant-Appellant Temora Trading Co., Ltd., a Bahamian Corporation, and the Defendants Boyd James O'Donnell, Joan O'Donnell, Michael W. Mogan, Burton Bergeron, Eugene Fox, Ted Ivy, James Gleason, a fictitious person, Nuovo Anstalt, a Lichtensteinian Trust, and Does 1 through 100, inclusive. The identity of the Does 1 through 100, has not been divulged by Plaintiff and Respondent.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

Petitioner Temora Trading Co., Ltd., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the decision of the Supreme Court of the State of Nevada.

OPINIONS BELOW

1. The Opinion of the Nevada Supreme Court is annexed hereto as Appendix A. The Order Denying Rehearing is annexed as Appendix B.

2. The Opinion and Judgment of the District Court of the Fourth Judicial District of the State of Nevada, In and For the County of Elko entered on July 13, 1981 is annexed hereto as Appendix C.

3. The Opinion of the Ninth Circuit Court of Appeals dated January 26, 1979, is annexed hereto as Appendix D.

JURISDICTION

1. The Judgment sought to be reviewed is that of the Nevada Supreme Court which was made and entered on

May 27, 1982, and a copy thereof is annexed to this Petition at Appendix A. Petitioner timely filed a Petition for Rehearing in that Court which was denied on June 23, 1982. (See Appendix B.)

2. This Petition for Certiorari was filed within 90 days of June 23, 1982.

3. The jurisdiction of this Court is invoked under 28 U.S.C. §1257, and Rule 17 of the Rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. The Fourteenth Amendment to the Constitution of the United States Section 1 provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce

any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Nevada Rules of Civil Procedure 37(d) provides as follows:

"Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action

authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereof, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

"The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)."

3. The Bahamian Bank and Trust Companies Regulation Act is annexed hereto as Appendix E.

4. The Text of the following Statutes is reproduced in Appendix F.

Section 11(e) of Federal Bankruptcy Act of 1938 (11 U.S.C. §29(e)).

Section 70(a) of Federal Bankruptcy Act of 1938 (11 U.S.C. §110(a)).

STATEMENT OF THE CASE

Boyd O'Donnell was a businessman residing in Southern California, who during the 1960's had acquired title to certain real estate interests located both in Southern California and Nevada. James Gleason was a businessman and citizen of the United Kingdom, living in the Bahamas. O'Donnell had become indebted to him in the latter part of 1968 and 1969 for monies loaned and had deeded to him his real estate interests to secure the debt. O'Donnell could not pay these debts and the transfers for security were then made absolute in

payment of O'Donnell's debts by the latter part of 1969. O'Donnell's brother, Robert, along with some of Robert's business entities, also assigned some real estate interests to Gleason.

On March 13, 1970, Boyd and his then wife, Joan O'Donnell, filed voluntary Petitions in Bankruptcy in Phoenix, Arizona, and Wallace Perry was appointed and acted as the O'Donnells' Trustee in Bankruptcy. This case was filed under the old Bankruptcy Act, in force at that time. Thus, the provisions of the new Bankruptcy Code, effective October 1, 1979, do not apply to this proceeding.

O'Donnell's former attorney, Eugene Wolver, and a former business associate Walter Goodwin, filed objections to O'Donnell's discharge in Bankruptcy,

contending, among other things, that James Gleason did not exist, and on the date of bankruptcy, March 13, 1970, O'Donnell still owned the realty and thus title to this realty had passed to Perry by operation of law.

Perry then secured the issuance of a series of injunctions restraining a variety of persons, including Gleason, from further transferring the realty, until Perry could determine the validity of Gleason's title. The injunctions were issued first by the Arizona Bankruptcy Court. Later in 1971 Perry instituted ancillary Bankruptcy proceedings in California, and started obtaining the issuance of injunctions there. The procedure was to locate a piece of property to which Perry might be able to conjure up a claim, and then get an

injunction issued which would then be recorded with the County Recorder in the County where the realty was located and thus cloud the title. Perry did not file any lis pendens, since he never filed any actions to actually determine the validity of Gleason's title. The applications for the injunctions themselves were never served upon Gleason or Temora, a fact of great importance. Perry obtained an injunction and served it on Mogan, Fox, Ivy and Bergeron, land sales contract vendees from O'Donnell, of the Nevada realty which contracts had also been assigned to Gleason. Perry, in 1971, intercepted those payments and had Mogan, et al, pay them to him despite the fact the applications for the injunctions were never served on Gleason or Temora, and they never had a

chance to resist them. Perry seized over $100,000.00 in payments, which were the only funds in O'Donnell's bankruptcy.

In July 1971, Gleason decided to transfer his real estate holdings to Temora, in exchange for the controlling stock of that corporation. On July 7, 1971, Gleason appeared before A.L. Halff, the American Vice Consul in the Bahamas, and had his signature notarized upon the deeds, assignments and other conveyances. With him were O'Donnell and Robert Timbrook, an architect. Temora then issued its shares to Gleason in exchange for the realty. Temora then recorded all of these conveyances in the counties where the land was located both in California and Nevada. Gleason then delivered his shares to a Lichtenstein

trust known as Nuovo Anstalt.

In 1974, Temora attempted to sell some land in California and found its title clouded by the recorded injunctions. Temora filed a lawsuit against Perry seeking to have the California Bankruptcy Court declare that the injunctions were void and invalid as to it, since the applications upon which they were based were never served upon Gleason, Temora's predecessor in title, and that the injunctions did not name Temora. In 1975, the case was tried in the United States Bankruptcy Court, Central District of California. While Perry never counter nor cross claimed, he resisted Temora's action on the theory Gleason was a fictitious person. That was the sole factual issue raised by Perry in the pre-trial order that

governed the trial. The Bankruptcy Judge allowed Perry to present evidence upon this issue, but at the end of the trial, ruled that Perry had not proved his contention that Gleason and O'Donnell were the same or that Gleason didn't exist. The Bankruptcy Judge refused to give judgment to Temora, on other technical grounds. Temora appealed, and eventually secured a reversal in the Ninth Circuit Court of Appeals, which held all of the injunctions were void for lack of jurisdiction over Gleason. Temora contends that judgment is res adjudicata on the whole issue of this lawsuit. A copy of that decision is annexed hereto as Appendix D.

Starting in 1974, and continuing through 1977, Perry then began to file a

series of actions; first in the Bankruptcy Court in Arizona and then in California, seeking to set aside Temora's title. Temora objected to these actions upon the grounds that it chose not to submit itself to the summary jurisdiction of the Bankruptcy Court where it would be denied the right to a trial by jury. Perry never filed any counter or cross claim against Temora in the action Temora had started in the Bankruptcy Court where Temora had submitted itself to jurisdiction.

Finally, on September 1, 1977, Perry started this action, as an in rem action, to quiet title to the real estate in Nevada. Temora answered and then moved for a summary judgment upon the ground that all federal and state statute of limitations had long since

expired, and that the California Judgment of October 2, 1975, was res adjudicata on the issues of this case, and barred Perry from bringing this action.

The trial Judge denied Temora's motion on both grounds.

Perry then filed a Fourth Amended Complaint to set aside, as fraudulent conveyances, the transfers made by O'Donnell to Gleason back in 1965-1969. The trial court, however, continued to allow Perry to conduct a "fishing expedition" by discovery into the assets and business affairs of Temora, totally unrelated to those transfers, up to and including the present time. Temora repeatedly and continuously objected to any scrutiny beyond the date of the transfers of O'Donnell to Gleason, which were the

only transactions attacked by Perry's complaint.

Temora's position, which remained unchanged throughout the litigation, was that if Gleason existed, then O'Donnell's transfers were valid and on March 13, 1970, the date of Bankruptcy, O'Donnell held no title which passed to his Trustee in Bankruptcy, Perry. If Gleason did not exist, then on March 13, 1970, O'Donnell still held the property and title passed to Perry regardless of what O'Donnell did with it after that date. If Gleason did obtain the title, then what he did with it after Bankruptcy was no concern of Perry. Gleason could have given the property back to O'Donnell and Perry would have no claim to it, since Perry's rights were fixed as of March 13, 1970.

This lawsuit was never an action to declare that Temora was O'Donnell's alter ego, or to pierce Temora's corporate existence. Thus, Temora's transactions in the late 1970's were totally irrelevant to the issues of this lawsuit. The attempt to depose Temora's officers, namely Donald Aberle, Anthony F. Bowe and Lorraine Burrows, should also have been denied since they didn't even become officers of Temora until 1976, when their corporation, Columbus Trust Co., took over the management of Temora.

The trial Judge continually and summarily denied Temora's attempt to limit discovery and to focus the lawsuit upon its true issues; to wit, the transfers from O'Donnell to Gleason, and

the state of the title to the realty as of March 13, 1970.

Eventually, Perry noticed the deposition of Aberle, Bowe, and Burrows for April 2, 1981. Aberle refused to appear at the deposition scheduled in the American Consulate in Nassau, upon the grounds he was prohibited from doing so, without an order from a Bahamian Court, under the Bahama's Bank and Trust Companies Act. A copy of that Statute is annexed hereto as Appendix E. Perry then had his Elko counsel secure an Ex Parte Order from the trial Judge requiring Aberle's appearance for the next day. That Ex Parte Order was served late the afternoon of April 2, 1981, on Temora's Elko counsel, Richard Barrows. When Aberle refused to appear

the next day, Perry cancelled all further depositions.

Perry filed a Motion for Sanctions, or in the Alternative, for a Summary Judgment. Temora resisted raising the issue of both the Statute of Limitations, the irrelevancy of Aberle's testimony and the issue of Bahamian Law. The Court struck Temora's Answer and entered a Default Judgment quieting title to all of Temora's realty in both Nevada and California, without requiring Perry to supply any evidence of any sort. Much of this property had not been transferred to Gleason by Boyd, but by Robert O'Donnell, and other corporate entities.

The Ex Parte Order of April 2, 1981, since it involved an exercise of judicial discretion, was void under

Nevada Law and could not be the basis of a sanction order. None of the Court Findings were supported by any admissible evidence, but, even so require a judgment in favor of Temora and not Perry. Perry's counsel admitted on the record that the affidavits in support of his Motion were all defective.

ARGUMENT

I.

A FOREIGN CORPORATION OWNING LAND IN NEVADA IS ENTITLED TO THE PROTECTION OF THE FOURTEENTH AMENDMENT IN DEFENDING ITS PROPERTY INTEREST.

It has long been established that the due process clause of the Fourteenth Amendment applies to aliens.

Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1952).

As far as property rights are concerned, it is generally accepted that private corporations are "persons" within the scope of the guaranties of due process, and in this respect fall within the protection of the constitution, and this includes foreign corporations permitted to do business within a state.

Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673 (1938).

Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112 (1923).

II.

IT WAS A DENIAL OF DUE PROCESS TO STRIKE TEMORA'S ANSWER FOR RAISING A PROCEDURAL REQUIRMENT OF BAHAMIAN LAW AS TO DEPOSITIONS OF ITS OFFICERS BEING CONDUCTED IN THE BAHAMAS.

The Nevada Supreme Court decision upheld the trial Court only as a default judgment. This was based upon the conclusion that the failure of Temora's officers to appear at their depositions in the Bahamas was willful. The Supreme Court simply overlooked the decision of this Court in **Societe Internationale Pour Participation Industrielles et Commerciales, SA v. Rogers**, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) which held that the harsh sanction of striking an answer and entering a default judgment cannot be applied when failure to obey the order

of the Court was occasioned by the party's inability to do after good faith efforts at compliance. In addition, the Nevada trial Court held no hearings nor took any evidence on the issue of Temora's lack of good faith, or of the applicability of Bahamian Law. Its conclusion that Temora was avoiding discovery was an excuse used by a hostile and biased trial Court to reach a result it could not reach on the merits.

Secondly, Temora's officers never refused to attend the depositions. They merely insisted that Perry follow the requirements of Bahamian Law, in securing their deposition. The procedures for a deposition under Bahamian Law are identical for the procedures for deposing a non-party witness under Nevada Law. It simply requires the filing of

an ancillary action in a Bahamian Court and the issuance of process by that Court.

Perry's bad faith is demonstrated by his failure to even attempt to comply with the Bahamian Bank and Trust Company Act. Perry wanted an excuse to win by default, and the trial Court granted this default without a hearing or testimony.

Even assuming that the Bank and Trust Companies Act granted Temora a mere privilege which it could waive, the Federal Courts have uniformly held that a party litigant cannot be forced to choose between its privilege and its lawsuit.

Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5 C.A. 1979).

International Union Etc. v. National Right To Work, 590 F.2d 1139 (D.C. C.A. 1978).

Familias Unidas v. Briscoe, 544 F.2d 182 (5 C.A. 1976).

United States v. Costello, 222 F.2d 656, 21 F.R. Serv. 37b. 244, Case 1 (2 C.A. 1955).

III.

THE TRIAL COURT'S FINDINGS MANDATED A JUDGMENT FOR TEMORA IN THAT THEY FOUND GLEASON EXISTED, THUS ESTABLISHING THE BAR OF THE TWO YEAR FEDERAL STATUTE OF LIMITATIONS.

The Nevada Supreme Court decision used the excuse of striking Temora's answer to circumvent the two year Statute of Limitations found in Section 11(e) of the Federal Bankruptcy Act of 1938 (11 U.S.C. 29(e)).

Feldman v. First National Bank City Bank, 511 F.2d 460 (2 C.A. 1975).

The decision overlooked the fact that even the hostile and biased trial Judge did not swallow Perry's contention that Gleason was a fictitious person and specifically found in Findings of Facts No. 1, 2, and 3 of his Judgment (Appendix C) that Gleason did exist and that O'Donnell transferred the real estate to him. The trial Judge then went on to find Temora was O'Donnell's alter ego. This theory was never plead by Perry, and was irrelevant, since, if Gleason existed and held title on March 13, 1970, Gleason could have given it back to O'Donnell after bankruptcy and Perry could not complain. Perry's rights as

Trustee in Bankruptcy were fixed on March 13, 1970.

Section 70(a) Bankruptcy Act of 1938 (11 U.S.C. §110(a)).

The Nevada Supreme Court also ignored the res adjudicata effect of the Ninth Circuit decision which Temora had placed in evidence when it filed its Motion for Summary Judgment in the case (Appendix D).

SUMMARY

A provincial, biased and hostile trial Court essentially confiscated Temora's property, without a trial and without receiving any evidence on the merits of an action filed on September 1, 1977, against Temora as a defendant. When Temora appeared and defended on the grounds of the Statute

of Limitations, and the Doctrine of Res Adjudicata, its Motion for Summary Judgment was denied without reason or excuse.

The trial Judge then permitted Perry to conduct discovery into corporate affairs of Temora, totally unrelated to the issues of the lawsuit, and over Temora's repeated objection. When Temora resisted deposition of its officers upon the grounds that Perry was not following the procedures established by Bahamian Law, its Answer was struck, and its property confiscated. The trial Judge did not even attempt to determine whether the provisions of Bahamian Law were applicable, but found Temora's counsel acted in "bad faith" in urging the protection of the Bahamian Statutes.

This case has extreme importance, at a time when many foreign corporations and persons are investing in the United States. This Court should undertake to consider when the laws of the foreign corporation country, can be summarily disregarded to justify an unconstitutional seizure of property.

Respectfully submitted,

RICHARD M. MONEYMAKER

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